SUPREME COURT OF THE UNITED STATES.

No. 85

WHITE'S BANK OF BUFFALO, APPELLANT,

vs.

THE PROCEEDS OF THE SCHOONER ROBERT EMMETT,
ROBERT SMITH, CLAIMANT.

POINTS FOR APPELLANT.

L. K. HADDOCK, ~~Proctor~~. Counsellor

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WHITE'S BANK OF BUFFALO,
Petitioner and Appellant,
vs.
THE PROCEEDS OF THE SCHOONER ROBERT EMMETT, ROBERT SMITH
Claimant and Appellee.

APPELLANT'S POINTS.

This is an appeal from the decree of the Circuit Court of the United States for the Northern District of New York, which reversed the decree entered on the 18th of April, 1866, in the District Court of the United States for the Northern District of New York, directing the proceeds of the sale of the schooner Robert Emmett, remaining in the registry of said court, to be paid to White's Bank of Buffalo, the petitioner.

ABSTRACT OF CASE.

Gabriel Hoyt, on the 22d May, 1863, then a resident of the city of Buffalo, county of Erie and State of New York, executed a mortgage to White's Bank of Buffalo upon the schooner Robert Emmett, of which he was then sole owner, which was filed June 5, 1863, in Erie county Clerk's office, and recorded June 12, 1863, in the Collector's office of the port of Buffalo Creek, where she was then enrolled, to secure any indebtedness from Hoyt to White's Bank of Buffalo. Said mortgage was a good and valid mortgage, made in good faith and without intent to defraud the creditors of Hoyt or subsequent purchasers in good faith. Hoyt became indebted to White's Bank of Buffalo, February 6, 1865, in the sum of $2,000, which matured March 25, 1865, and on the 10th of March, 1865, in the further sum of $2,000, which matured April 27, 1865.

July 15, 1865, the schooner Robert Emmett coming into the port of Buffalo Creek, was taken possession of by White's Bank of Buffalo, by virtue of the mortgage so executed, upon which there was then due the sum of $4,000, and said vessel was sold on the 28th August, 1865, to White's Bank of Buffalo, upon foreclosure of said mortgage. It is alleged and admitted that by such sale White's Bank became the sole, and true, and bona fide holder of said schooner, and that no other person was the owner thereof. (See case, pages 32, 33.) The only question as to this mortgage was as to its re-filing. (See case, page 29.)

Hoyt, on or about the 31st of March, 1865, conveyed one-half of said schooner to Henry Zahn, of Tiffin, in the State of Ohio, by bill of sale, dated April 7, 1863, and recorded in Collector's office at the port of Buffalo Creek, March 31, 1865. At the time of such sale, Zahn knew of the existence of White's Bank mortgage, and that there was $4,000 due thereon. (Case, page 34.)

During the year 1863, and subsequently, the said Zahn was engaged in buying and shipping lumber to Hoyt on joint account. This lumber was shipped to William G. Grant & Son, of the city of New York, and on the 28th of March, 1865, they held twenty or thirty thousand dollar's worth of such lumber, upon which they had made advances to Hoyt and Zahn amounting to $40,000; to secure the payment of which, Hoyt and Zahn mortgaged to William G. Grant & Son the schooner Robert Emmett. This mortgage was dated March 28, 1865; filed April 3, 1865, in Collector's office at the port of Buffalo Creek; filed April 6th in Register's office of the city of New York, where Hoyt then resided, and filed April 8, 1865, in the Erie county Clerk's office. This mortgage was made in good faith, without any intent to defraud any person. This mortgage was sold and transferred to White's Bank of Buffalo on the 28th August, 1865, and before the sale or foreclosure of the first mortgage took place, (case, page 12,) and White's Bank of Buffalo became mortgagee in possession of said schooner as soon as she came into port, by virtue of said two mortgages, before sale on either. On the 28th of August, 1865, the Emmett was sold on foreclosure to White's Bank of Buffalo.

On the 29th of August, 1865, said schooner, then lying in the port of Buffalo Creek, and in the possession of White's Bank of Buffalo, was seized by the Marshal of the Northern District of New York, by virtue of a warrant of arrest issued upon filing a libel for seaman's wages, and on the 28th of September, 1865, said Marshal sold said schooner, by virtue of a decree of said court, to White's Bank of Buffalo, for the sum of $5,000; and that after satisfying said decree, there remained in the registry $4,682.91, and thereupon said White's Bank filed its petition, praying that the sum aforesaid be paid to said petitioner.

Robert Smith, of Green Spring, in the State of Ohio, the claimant, admits all the above facts, and claims the proceeds in the registry of this court upon the following facts:

The schooner Robert Emmett was enrolled at the port of Buffalo Creek prior to April 8, 1865, when it was enrolled at Sandusky, Ohio.

Hoyt conveyed his remaining one-half of the Emmett to Zahn, by bill of sale, dated April 27, 1865; recorded May 6, 1865, in

Collector's office at port of Sandusky. No consideration was paid for this bill of sale, but Zahn agreed to pay off the debts of Hoyt.

June 5, 1865, Zahn, then residing at Tiffin, Ohio, executed a mortgage to Robert Smith, the claimant, upon the said schooner, dated June 5, 1865; recorded at Sandusky Collector's office, June 19, 1865; filed and recorded at Tiffin, Seneca county, Ohio, Nov. 25, 1865; (this was after White's Bank of Buffalo had become the owner of said vessel;) to secure one draft of Zahn on Hoyt for $1,500, dated Dec. 19, 1864, and which matured Feb. 23, 1865; another draft of Zahn on Hoyt for $1,500, dated Dec. 19, 1864, and which matured March 22, 1865; a note of Zahn for $1.000, dated Feb. 27, 1865, which matured Feb. 27, 1865; a note of Zahn for $1,000, dated Feb. 27, 1865, which matured March 29, 1865; one note of Zahn for $985.59, dated Feb. 27, 1865, which matured April 16, 1865. Zahn retained possession of the schooner after the mortgage was executed to Smith, although there was no provision in the mortgage allowing him to do so. Proof was offered tending to show this mortgage was given by Zahn in consideration of Smith giving him further time to pay, and that Smith thereby lost the ability to collect his debt. Upon these facts the Hon. D. A. Smalley, District Judge, made his decree, that White's Bank of Buffalo be paid the proceeds of the sale of said schooner remaining in the registry of this court, which bears date April 18, 1866. Upon appeal to the Circuit Court of the United States for the Northern District of New York, this decree was reversed and the proceeds directed to be paid to Robert Smith, and thereupon White's Bank of Buffalo appeals to this Court.

The decree of the Circuit Court should be reversed and the decree of the District Court, awarding the proceeds of the sale of the schooner Emmett to be paid to White's Bank, should be affirmed.

POINT FIRST.

The mortgage of White's Bank upon the schooner Robert Emmett was recorded as required by the act of Congress passed July 29, 1850, (vol. 9, U. S. Statutes, p. 440,) viz.:

"§ 1. That no bill of sale, mortgage, hypothecation, or conveyance of any vessel, or part of any vessel, of the United States shall be valid against any person other than the grantor or mortgagor, his heirs and devisees, and persons having actual notice thereof, unless such bill of sale, mortgage, hypothecation, or conveyance be recorded in the office of the collector of the customs where such vessel is registered or enrolled."

POINT SECOND.

The act of the legislature of any State, so far as it requires chattel mortgages upon vessels to be recorded, is a regulation of commerce, and therefore repugnant to that clause of section eight of the Constitution, which provides:

Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes.

The power to regulate commerce is general and unlimited in its terms. The full power to regulate a particular subject implies the whole power, and leaves no *residuum.* A grant of the whole is incompatible with the existence of a right in another to any part of it. A grant of a power to regulate, necessarily excludes the action of all others who would perform the same operation on the same thing.

2 *Story on Const.*, *p.* 8, § 1067, 3*d Ed.*
1 *Kent Com.*, *p.* 437.
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First. That the grant contained in the Constitution, together with legislation of Congress in pursuance thereof, inhibited the States from interfering with the subject matter of the Congressional legislation.

Second. That the subject matter thus withdrawn from the State jurisdiction need not have been the direct object of the national legislation; need not have been the self same thing with which that legislation was concerned; but it was sufficient, if the subject matter were incidentally and indirectly within the scope of the Congressional acts.

Third. The decree appealed from was reversed unanimously, and the statute of New York declared unconstitutional and void.

The case of Brown *vs.* Maryland, 12 *Wheaton's R.* 447, *A. D.* 1827, reaffirms the above propositions. It was held, the acts of Congress regulating, and therefore permitting importation, were held to be so complete an exercise of the power granted to the national legislature, as to preclude the States

from interfering with the sale of the goods by the importer. Justice Thompson dissented.

The principles of interpretation settled by the above cases are not overruled by Wilson *vs.* Blackbird Creek Company, 2 *Peters' R.*, 245, *A. D.* 1829. Justice Clifford, speaking of this case, in Gilman *vs.* Philadelphia, *3d Wallace's R.*, 743, says of it: "Judgment was rendered in that case by the same Court which gave judgment in the case of Gibbons *vs.* Ogden; and there is not a man living, I suppose, who has any reason to conclude that the constitutional views of the Court had at that time undergone any change." The law authorizing the erection of the dam was sustained as one adapted to reclaim the adjacent marshes, and as essential to the public health, and within the reserved police powers of the State.

The only point decided in the City of New York *vs.* Miln, reported in 11 *Peters' R.*, 102, *A. D.* 1837, was, that so much of the act of New York as required the captain of a vessel to report his passengers, as the act directs it to be done, was a police regulation, and therefore was not a violation of the power of Congress to regulate commerce. In the discussion of this case, it appears that four of the Justices were of the opinion, that, according to the Constitution and the decisions of this Court in Gibbons *vs.* Ogden, and in Brown *vs.* Maryland, the power in Congress to regulate commerce was *exclusive.* (See Justice Wayne's review in 7 *Howard*, 431.)

16 Peters 168

The question whether the mere grant to Congress of power to regulate commerce was exclusive, arose next in the license cases: Thurlow *vs.* Massachusetts, Fletcher *vs.* Rhode Island, and Pierce *vs.* New Hampshire, reported in 5 *Howard's R.*, 504, *A. D.* 1847.

From these cases it will appear that five of the Justices, Taney, Catron, Daniel, Nelson and Woodbury, concurred in the proposition that it requires, at least, a statute of Congress, passed in pursuance of the general grant of power in the Constitution to inhibit the State legislatures from enacting laws which regulate commerce. McLean and Grier did not adopt this view, and Wayne and McKinley were absent, or took no part in the decision.

The power of Congress to regulate commerce, was held to be exclusive in the passenger cases: Smith *vs.* Turner, on error from New York, and Norris *vs.* city of Boston, on error from Massachusetts, reported in 7 *Howard's R.*, 283, *A. D.* 1849. Five members of the Court, McLean, Wayne, Catron, McKinley and Greer, agreed in pronouncing the State laws void. Four members, Taney, Daniel, Nelson and Woodbury, dissented.

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that they fall within the department of police rules, for they relate to the well ordered government of harbors and of vessels therein. This case confirms the distinction made by Justice Baldwin, in Groves *vs.* Slaughter, reported in 15 *Peters' R.*, 511: "It follows that any regulation which effects the commercial intercourse between any two States, referring solely thereto, is within the powers granted exclusively to Congress; and that those regulations which only effects the commerce carried on within one State, or which refer only to subjects of internal police, are within the powers reserved."

The doctrine of Gibbons *vs.* Ogden, is reaffirmed by Pennsylvania *vs.* Wheeling Bridge Company, reported in 13 *Howard's R.*, 518, A. D. 1851. This case decides:

1st. That the Ohio is a public navigable stream.

2d. The Wheeling Bridge is an obstruction to free navigation.

3d. The law of Virginia authorizing it, is inoperative.

4th. It is in conflict with the legislation of Congress which regulates commerce upon this river.

Justices McLean, Wayne, Catron, McKinley, Nelson, Grier and Curtiss, concurred. Taney, C. J., and Daniel, dissented on the ground that Congress had passed no statute respecting the erection of bridges over the Ohio, but the Court held that the recognition of the Ohio as a navigable stream over which commerce was carried, was a sufficient act under the power to regulate commerce.

In the case of Smith *vs.* State of Maryland, reported in 18 *Howard's R.*, 71, *A. D.* 1855, the law of Maryland, passed to prevent the destruction of oysters within the waters of the State, was held not to conflict with any law of Congress whatever.

In the steamboat New York *vs.* Rea, owner of the brig Sarah Johanna, reported in 18 *Howard*, *p.* 223, *A. D.* 1855, it was claimed, admitting the brig had a light sufficient within the requirements of the admiralty rule, still she was in fault in not showing a light in conformity with the statutes of New York. Justice Nelson delivered the opinion of the Court, in which he says: "This is a rule of navigation prescribed by the laws of New York, and is doubtless binding upon her courts, but cannot regulate the decisions of the federal courts administering the general admiralty law. They can be governed only by the principles peculiar to that system, as generally recognized in maritime countries, modified by acts of Congress independently of local legislation."

The statute of Alabama, requiring a statement to be filed, giving the name of the vessel, the name of the owner, and his place of residence, etc., was declared void as far as it applied to steamboats enrolled under the laws of the United States. Sinnot *vs.* Davenport, reported in 22 *Howard's R.*, 227, *A. D.* 1859.

In Steamship Company *vs.* Port-wardens, reported in 6 *Wallace's R.*, 31, *A. D.* 1867, the statute of Louisiana, imposing a tax upon vessels, was declared repugnant to the constitution of the United States. Chase, C. J., in his opinion, says: "The power to regulate commerce was given to Congress in comprehensive terms. It was thus given with the obvious intent to place that commerce beyond interruption or embarrassment, arising from the conflicting or hostile State regulations."

In Crandell *vs.* State of Nevada, reported in 6 *Wallace's R.*, *p.* 35, *A. D.* 1867, the statute of Nevada, imposing a tax upon passengers leaving the State, was declared void. Chase, C. J., and Justice Clifford, thought commerce secure against such legislation in the States by the Constitution, *irrespective of any Congressional action.*

In Fontaine & Dent *vs.* Beers & Smith, reported in 19 *Alabama R.*, *p.* 722, *A. D.* 1851, the Court says: "We feel no hesitation in holding, that the statutes above referred to, were never designed to apply to the transfer of vessels for the navigation of the ocean. These transfers are subject to marine regulations of a different character, and the object of the statutes, which was to furnish evidence of title, and give notice to creditors and purchasers, could not be effected by registering the trust deed in any particular court, since the vessel continually changes her locality. The evidence of title is to be looked for in the ship's papers, and her registration according to the laws of Congress.

In Mitchell *vs.* Helman, reported in 8 *California R.*, *p.* 363, *A. D.* 1857, it was held that the act of Congress authorizing mortgages to be recorded, superseded State laws upon the same subject. Burnett, J., says: "The act of Congress has established a uniform rule, practical and secure rule, for the sale and mortgage of vessels. But if those vessels are still subject to the laws of the different States after Congress has legislated upon the subject, then there can be no certain and uniform rule."

In Shaw *vs.* McCandless, reported in 36 *Mississippi R.*, *p.* 296, *A. D.* 1858, the Court says: "When the law of Louisiana authorizes mortgages according to the laws and usages of commerce, and Congress establishes the rule regulating the subject, that rule becomes the law of commerce in relation to the subject, and if it authorizes the execution and registration of mortgages upon vessels, all mortgages made and recorded according to the requirements of the act must be void."

17 Howard 399
19 " 239

The law of 1850 overrides a State law.

The Martha Washington, 25 *Law R.*, 22.

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In Mitchell *vs.* Helman, reported in 8 *California R.*, *p.* 363, *A. D.* 1857, it was held that the act of Congress authorizing mortgages to be recorded, superseded State laws upon the same subject. Burnett, J., says: "The act of Congress has established a uniform rule, practical and secure rule, for the sale and mortgage of vessels. But if those vessels are still subject to the laws of the different States after Congress has legislated upon the subject, then there can be no certain and uniform rule."

In Shaw *vs.* McCandless, reported in 36 *Mississippi R.*, *p.* 296, *A. D.* 1858, the Court says: "When the law of Louisiana authorizes mortgages according to the laws and usages of commerce, and Congress establishes the rule regulating the subject, that rule becomes the law of commerce in relation to the subject, and if it authorizes the execution and registration of mortgages upon vessels, all mortgages made and recorded according to the requirements of the act must be void."

The law of 1850 overrides a State law.

The Martha Washington, 25 *Law R.*, 22.

17 Howard 399
19 " 239

The statute of the State of New York, requiring the payment of a sum of money for hospital purposes, from masters of vessels engaged in the foreign and coasting trade, was held to be in conflict with the provision of the Constitution of the United States investing Congress with the power to regulate commerce. Beardsley, J., says, in exercising the power to regulate commerce, Congress may "make all laws which shall be necessary and proper for" the purpose. (*Const.*, *Art.* 1, § 8, *sub.* 17.) Such as were deemed necessary or appropriate have been made, and they form a part of the supreme law of the land. (*Art.* 6, § 2.) As such, they unavoidably exclude all State legislation which would, in any degree, change or modify the system of Congress. The States cannot add to the regulations made by the paramount power of Congress, nor substract anything from them, the subject matter having been acted upon by Congress, was thereby placed completely beyond the reach or control of the States.

The People vs. Brooks, 4 *Denio*, 469, *A. D.* 1847.

This has been the uniform doctrine in regard to the bankrupt law. In Sturges *vs.* Crowninshield, 5 *Wheaton*, 122, Story, J., said: "All the Court were agreed that when Congress did pass a bankrupt act, it was supreme, and that the State laws must yield to it, and could no longer operate upon persons or cases within the purview of such act."

But in Golden *vs.* Prince, 3 *Wash. Circ. R.*, 313, the Court held, whether exerted or not, it supersedes State legislation.

[illegible] [illegible] Law

The case of the Ætna Insurance Company *vs.* Aldrich, 26 *New York R.*, 92, Horton *vs.* Davis, 26 *New York R.*, 495, and Thompson *vs.* Van Vechten, 5 *Abb. Prac. R.*, 458, are binding upon the courts of New York, but cannot, in the language of Justice Nelson, regulate the decisions of the Federal Courts administering the general admiralty law.

18 *How.*, 223.

POINT THIRD.

The omission to refile the White's Bank mortgage, according to the laws of New York, did not effect its validity as between the parties thereto.

Weles vs. Clapp, 41 *Barbour*, 645.
Thompson vs. Van Vechten, 27 *New York R.*, 568.
Hill vs. Beebee, 13 *New York R.*, 565.
Meech vs. Patchin, 14 *New York R.*, 71.
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POINT FOURTH.

Zahn, when he took his several bills of sale, knew of the existence of White's Bank mortgage, and that the whole amount secured to be paid thereby was due thereon, and agreed to pay them, and cannot be regarded as a purchaser in good faith.

Hill vs. Beebee, 13 *New York*, 556.
F. L. & T. Co. vs. Hendrickson, 25 *Barbour*, 488.
Sanger vs. Eastwood, 19 *Wendell*, 514.
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POINT FIFTH.

White's Bank of Buffalo had purchased the Robert Emmett upon foreclosure of a mortgage thereon, according to the laws of New York, and cannot be prejudiced by the execution of a mortgage in another State, especially after such title had been perfected. The laws of Ohio have no force in New York *ex propria vigore*, but merely *ex comitati*, especially when they clash with the rights of our citizens.

2 Denio 170
27 N.Y. 546
Conkling U.S. Ad'y 824
825

Montgomery *vs.* Wight, 8 *Mich.*, 143, *A. D.* 1860: If mortgagees desire to be protected when no notice can be made effectual, they must take possession, and not allow the mortgagor to take the property where third parties have no means of ascertaining its title.

Skiff *vs.* Solace, 23 *Vermont*, 279, *A. D.* 1851: Admitting the validity of the mortgage in New York, it by no means follows that it is to be received and recognized here, to defeat attachments made by our own citizens.

Woodward *vs.* Gates, 9 *Vermont*, 358, *A. D.* 1837: The Legislature of New Hampshire can make no provision to give effect to a record in Vermont, not required by laws of Vermont.

Where personal property is mortgaged without a delivery thereof to the mortgagee, and the mortgage is not recorded, a to be in conflict with the provision of the Constitution of the United States investing Congress with the power to regulate commerce. Beardsley, J., says, in exercising the power to regulate commerce, Congress may "make all laws which shall be necessary and proper for" the purpose. (*Const.*, *Art.* 1, § 8, *sub.* 17.) Such as were deemed necessary or appropriate have been made, and they form a part of the supreme law of the land. (*Art.* 6, § 2.) As such, they unavoidably exclude all State legislation which would, in any degree, change or modify the system of Congress. The States cannot add to the regulations made by the paramount power of Congress, nor substract anything from them, the subject matter having been acted upon by Congress, was thereby placed completely beyond the reach or control of the States.

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1 Peter ad 104
17 Howard 399

POINT SIXTH.

The law of New York is to govern as to the validity and effect of the mortgages held by White's Bank of Buffalo. The contract was made in that State, and the *lex loci contractus* governs. Under the laws of New York, White's Bank of Buffalo acquired a valid title to the Robert Emmett, and therefore the judgment of the District Court should be affirmed.

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17 N.Y. 580
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Section 3, chapter 279 of the laws of New York for 1833, provide: "Every mortgage filed in pursuance of this act, shall cease to be valid as against the creditors of the person making the same, or against subsequent purchasers or mortgagees in good faith, after the expiration of one year from the filing thereof; unless within thirty days next preceding the expiration of the said term of one year, a true copy of such mortgage, together with a statement exhibiting the interest of the mortgagee in the property thereby claimed by him by virtue thereof, shall be again filed in the office of the clerk or register aforesaid of the town or city where the mortgagor shall then reside."

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White's Bank is not only entitled to the entire proceeds by virtue of the title acquired by foreclosure of this mortgage, but also by virtue of the Grant mortgage, by the assignment of which and the taking of the Emmett, they became mortgagee in possession before Smith's mortgage was recorded in Tiffin, Ohio.

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Grant's mortgage was *properly filed in New York and Buffalo.* Hoyt gave up his residence in Buffalo, with the intent to take up his residence in New York. In the mortgage he described himself as a resident of New York. His business office was in New York. Going over to Brooklyn to his wife's father, with no intent of remaining there permanently, will not constitute him a resident of Brooklyn.

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1 Story Eq Juris 413
8 Johnson 96
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> *Story's Conflict of Laws*, 203.

The statute of Ohio provides, that

> Every mortgage or conveyance, intended to operate as a mortgage of goods and chattels hereafter made, which shall not be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, unless the mortgage or a true copy thereof shall be forthwith deposited as directed in the succeeding section of this act.
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> § 2. The instruments mentioned in the preceding section shall be deposited with the clerk of the township in this State, where the mortgagor therein, if a resident of this State, shall reside at the time of the execution thereof; and if not a resident, then with the clerk of the township where the property so mortgaged shall be at the time of the execution of such instrument.

Vol. 1, *Revised Statutes of Ohio*, 475, *Ed. of* 1860.

Under this act Smith's mortgage was of no effect, either in law or equity, previous to Nov. 25, 1865, when it was filed in the office of the clerk of the township of Tiffin, Ohio, where Zahn resided.

In Halliday *vs.* Franklin Bank of Columbus, 16 *Ohio Rep.*, 533, the Court said: "A mortgage under the statute shall take effect from the time it is delivered to the recorder to be entered on record. The recording or delivery for record is a part of the execution, and hence, before it is done, there is no execution." To the same effect is

Thompson vs. Van Vetchen, 5 *Abb. Rep.*, 458, 472.

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POINT ELEVENTH.

Smith's mortgage was presumptively fraudulent in consequence of the continued possession of the vessel in the mortgagor, and this presumption was not removed by affirmative proof of good faith and honest intent towards creditors and purchasers, and became conclusive under the statute, the mortgage not having been filed. 3 R.S. 7 N.Y. 222

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Russell vs. Winne, 37 *New York R.*, 591.

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6 Mass 422. 425

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1 Cranch 309
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Prentiss vs. Slack, 1 *Hill*, 468.
Murray vs. Burtis, 15 *Wend.*, 212.
Stevens vs. Fisher, 19 *Wend.*, 181.
Allen vs. Cowan, 28 *Barb.*, 100.
Tifft vs. Barton, 4 *Denio*, 171.
Griswold vs. Sheldon, 4 *Comstock*, 582.

In Otis *vs.* Sill, 8 *Barbour*, 102, Justice Paige said: "The filing of the mortgage does not rebut the presumption of fraud arising from the non-delivery of the property, or excuse the party who claims, under the mortgage, from affirmatively showing, where there is no change of possession, that the mortgage was made in good faith and without any intent to defraud creditors or purchasers." See, also,

Bissell vs. Hopkins, 3 *Cowen R.*, 166, 188.
Hall vs. Tuttle, 8 *Wend. R.*, 375, 399.

Smith's mortgage contained no provision relative to the possession of the vessel, and he could and should, upon its execution, have taken immediate possession.

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Shuart vs. Taylor, 7 *Howard N. Y. R.*, 254.
2 *Kent Com.*, 517.
Hall vs. Sampson, 35 *N. Y. R.*, 274–7.
Coote on Mortgages, p. 288–9, 2d *American Ed.*

Smiths Leading Cases 1 vol 46.65.67

In Freeman *vs.* Rawson, 5 *Ohio State R.*, 7, the Court said: "A uniform holding has been, that it is a badge of fraud, but not conclusive, and subject to be rebutted by evidence showing some good reason why the possession is not changed." To the same effect is

Hornbeck vs. Vanmetie, 9 *Ohio R.*, 153.
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This evidence is not admissible to excuse his omission to take possession till the mortgage is filed.

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Reid v Helmuth 5 M & P 553
7 Bingham 577
Conrad v Atlantic Ins Co 1 Peters 386, 449.

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POINT TWELFTH.

A second mortgage must affirmatively show good faith, in order to attach a prior mortgage. (Baskins *vs.* Shannon, 3 *Comstock*, 310.) The consideration of Smith's mortgage was a precedent debt, and therefore he is not a mortgagee in good faith, and cannot question White's Bank mortgage.

This is the doctrine with respect to bills of exchange.

Coddington vs. Bay, 20 *Johnson's R.*, 637.
Stalker vs. McDonald, 6 *Hill*, 93.
Wardell vs. Howell, 9 *Wendell*, 170.
Rosa vs. Brotherson, 10 *Wendell*, 86.
Ontario Bank vs. Worthington, 12 *Wendell*, 593.
Payne vs. Cutler, 13 *Wendell*, 605.
Bank of St. Albans vs. Gilliland, 23 *Wendell*, 311.
Youngs vs. Lee, 2 *Kernan*, 551.
Farrington vs. The Frankfort Bank, 24 *Barb.*, 554.
Bright vs. Judson, 47 *Barbour*, 29.
Chesbrough vs. Wright, 41 *Barbour*, 28.
Webster vs. Van Steenbergh, 46 *Barbour*, 212.
Lawrence vs. Clark, 36 *N. Y.*, 128.
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In Van Heusen & Charles *vs.* Radcliff, 17 *New York R.*, 580, Justice Denio held: "When the act respecting the filing of chattel mortgages was passed, the term bona fide purchaser had acquired a settled meaning, which did not include a person whose purchase was on account of an existing debt.

The interpretation of a State statute by its highest court is as binding on the United States courts as the text.

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Story Eq Juris § 805 § ~~84~~604

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In Tiffany *vs.* Warren, 37 *Barbour R.*, the Court says: "A mortgagee on account of a pre-existing debt, parts with nothing, and is not considered as having acquired title or the right to hold property as security against a prior mortgage not recorded."

In Dickerson *vs.* Tillinghast, 4 *Paige Ch. R.*, 215, the Chancellor says: "If the subsequent purchaser or mortgagee was a bona fide purchaser; that is, if he had actually parted with his property on the credit of the estate, so as to give him an equitable claim or specific lien thereon without notice of the prior equity, and had also clothed that equitable lien with the legal title by taking a deed or mortgage, the Court would

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Approved in Morse vs. Godfrey, 3d Story Circuit Court R., 364–9, A. D. 1844, per Story, J.

In Merritt *vs.* Northern Railroad Co., 12 *Barb.*, 605, the point was, whether a mortgage given to secure a pre-existing debt shall have preference over an unrecorded grant or a lien given for a valuable consideration, and the Court said: "In order to give the recorded conveyance a preference from that circumstance alone, it must be to a bona fide purchaser. It must be a purchaser for a *valuable* consideration paid or parted with."

In Pickett *vs.* Barron, 29 *Barb.*, 505, Judge Smith says: "To constitute a bona fide purchaser within the meaning of the recording acts, the party receiving the subsequent conveyance must not only have received the same without notice of the prior unrecorded deed, but he must have received the same upon some *new* consideration advanced at the time, or must have relinquished some security for a pre-existing debt due him.

Approved in Webster vs. Van Steenbergh, 46 Barb., 212.
Approved in Woodburn vs. Chamberlin, 17 Barb., 446.

In Wood *vs.* Robinson, 22 *N. Y. Rep.*, 564, *A. D.* 1860, the Court said: "Where a conveyance is made, or a security taken, the consideration of which was an antecedent debt, the grantee, or party taking the security, is not looked upon as a bona fide purchaser," and cites as authority

In the matter of Howe, 1 *Paige*, 125.
Arnold vs. Patrick, 6 *Paige*, 310.
Hallock vs. Smith, 3 *Barb.*, 267.

POINT THIRTEENTH.

Neither of the parties having complied with the statute, he who is first in time is superior in right. also in possession

Tiffany vs. Warren, 37 *Barb.*, 571.
Cherry vs. Munro, 2 *Barb., Ch. R.*, 618.

1 Story Eq Juris § 381 page 410
§ 413

17 [illegible] 54

SUPREME COURT OF THE UNITED STATES.

No. 85.

WHITE'S BANK OF BUFFALO, APPELLANT,
vs.
THE PROCEEDS OF THE SCHOONER ROBERT EMMETT,
ROBERT SMITH, CLAIMANT AND RESPONDENT.

RESPONDENT'S POINTS.

SHERMAN S. ROGERS, Counsel for Claimant and Respondent.

SUPREME COURT OF THE UNITED STATES.

WHITE'S BANK OF BUFFALO, Petitioner and Appellant, *vs.* THE PROCEEDS OF THE SCHOONER ROBERT EMMETT, HER TACKLE, &c. ROBERT SMITH, Claimant and Respondent.	Points for Claimant and Respondent.

STATEMENT OF FACTS.

This is an appeal from the decree of the United States Circuit Court for the Northern District of New York in Admiralty, entered November 16th, 1866, reversing the decree of the District Court, by which the remnants of the proceeds of the Schooner Robert Emmett, amounting to about $4,436.68, were directed to be paid to the petitioner.

The appellant claims the moneys, under a mortgage, dated May 22, 1863, made by Gabriel Hoyt (who was then the sole owner of the vessel) to the appellant as a continuing security for $4,000 and interest.

At the time this mortgage was given, Hoyt resided in the city of Buffalo, and the mortgage was properly filed in the office of the Clerk of Erie County, June 5, 1863, and recorded in the office of the Collector of the Port of Buffalo (where the vessel was enrolled) on the twelfth of the same month, *but neither the mortgage nor any copy thereof was ever afterwards re-filed.* (Fol. 33.)

There was due and unpaid of the moneys secured by this mortgage on the twenty-eighth of August, 1865, the sum of $4,000, with interest on $2,000 from March 28, 1865, and on $2,000 from the twenty-seventh of April, 1865. The entire debt accrued before the giving of the mortgage to Grant & Son, which is hereinafter mentioned. (Fols. 33 and 34.)

July 15, 1865, the appellant took possession of the vessel under this mortgage, and, pursuant to the power of sale contained therein, advertised her, and on the twenty-eighth of August, 1865, sold her (the appellant being the purchaser) for $1,500. (Fol. 33½.)

With the exception of this $1,500, the whole amount of said $4,000 and interest, due to the appellant as aforesaid, remains unpaid. (Fol. 33½.)

On the sixth of February, 1865, Hoyt abandoned Buffalo as a place of residence, and went east with his family, intending to find a residence in New York, which he failed to do, and during the same month he took up his residence (as we claim) in the city of Brooklyn.

On or about the thirty-first of March, 1865, Hoyt sold one-half of the "Emmett" to Henry Zahn, who then resided, *and ever since has resided*, at Tiffin, Ohio, and the bill of sale was on that day recorded in the Collector's Office at Buffalo. (Fol. 33½.)

On or about the twenty-eighth of March, 1865, Hoyt and Zahn executed a mortgage upon the "Emmett," which was then lying at Sandusky, Ohio, to W. G. Grant and W. G. Grant, Jr., (Grant & Son,) of New York, *who then had notice of the existence of the mortgage to White's Bank*, (fols. 97½, 78½,) reciting an indebtedness from the mortgagors of $12,000, but not saying what for, (*it was in fact a precedent debt*, fols. 38½, 39,) and conditioned for the payment of that sum on or before the first day of October, 1865. (Fols. 34¾, 52–57.) This mortgage was dated March 28, 1865, and recorded in the office of the Collector of the Port of Buffalo, April 3, 1865, and a copy thereof was filed in the office of the Register of the City of New York, April 6th, 1865. No copy was filed in the office of the Clerk of Kings County, in which county the respondent claims that Hoyt resided at the time of the execution of said mortgage. (Fol. 35.)

The testimony on the subject of Hoyt's residence at that time will be found at folios 36 to 44.

On the twenty-seventh of April, 1865, Hoyt sold and conveyed his remaining half of the "Emmett" to Zahn by bill of sale, dated that day, and recorded in the office of the Collector of the Port of Sandusky, May 6th, 1865, in which office the vessel was then enrolled. (Fol, 34.)

Zahn, at the times he acquired the several interests in the "Emmett" from Hoyt, knew of the mortgage to White's Bank, and that there was $4,000 of the debt secured thereby still owing.

On the fifth of June, 1865, Zahn mortgaged the "Emmett," which was then lying at Sandusky, Ohio, and in his possession, to Robert Smith, the respondent, to secure a precedent debt amounting to about $6,000, exclusive of interest, which was then due, and at the time entirely and easily collectable out of Zahn's property. (Fols. 61–67, 76¾, 80½, 81.) This mortgage was given in order to obtain an extension of time for the payment of the indebtedness, and at the time it was given it was agreed by Smith, (acting through his attorney, Mr. Hard,) that the time for payment should be extended to the first day of November, 1865. (Fol. 67½.) (See affidavits of J. K. Hard and Robert Smith, 61–72; also depositions of Zahn and Huss. Fols. 74–82.)

Smith, at the time he took this mortgage and extended the time for payment of his debt, had no notice of either of the preceding mortgages on the "Emmett," but believed that she was entirely unencumbered. (Fols. 68, 70, 71.) *He took the mortgage in good faith, and relying upon the security thereof, extended the time as aforesaid, (fol.* 67, 68,) *and thereby lost his debt, (unless he shall be able to collect it out of the moneys in the Registry of the District Court,)* for he never learned of the existence of the previous mortgages until Zahn's other creditors had seized upon all his other property, and Zahn became hopelessly insolvent. (Fol. 71½.)

Smith would have proceeded at once to collect his debt, had not Zahn executed to him the mortgage on the Emmett, and had not Smith believed that he was thereby made perfectly secure. (Fols. 67–71.)

On the fifteenth of July, 1865, the appellant took possession of the schooner under its mortgage, at the city of Buffalo, and foreclosed it by a sale pursuant to the power contained in the mortgage; the sale was regularly made on the twenty-eighth of August, 1865, and the appellant became the purchaser. (Fols. 9½, 33½.)

On the twenty-eighth of August, 1865, the day of the sale on the foreclosure, an arrangement was made by Mr. Haddock, the attorney of White's Bank of Buffalo, and Mr. Davis, the attorney of Grant & Son, by which the Bank agreed to bid off the vessel and take proceedings to have her sold in the admiralty, in order to perfect a title, and dispose of her to the best advantage, and after paying the debt to the appellant, pay over the surplus to the Messrs. Grant. (Haddock's testimony, fols. 30, 31.)

The Bank did bid off the vessel at the foreclosure sale under this arrangement.

On the twenty-ninth of August, 1865, the vessel was libeled for seamen's wages, (not, however, at the instance of White's Bank of Buffalo,) and sold under the decree therefor, and the remnants remaining in the registry of this court, at the time of the trial in the District Court, *were not enough to pay the claims of White's Bank* upon its said mortgage, after paying the disbursements of this proceeding.

On or about the tenth of October, 1865, the Messrs. Grant executed an assignment of their mortgage to the appellant. (Fol. 58.)

Possession of the vessel never accompanied either of the mortgages.

On the twentieth of October, 1865, the petition herein was filed. Robert Smith appeared and answered. (Answer, fols. 8–14.)

The cause was tried April 16, 1866, before Judge Smalley at Buffalo, and a decree pronounced in favor of the petitioner, (fol. 67,) declaring both the mortgage to the appellant, and that to Grant & Son, liens on the moneys prior to the liens of the respondent's mortgage, and directing the moneys to be paid over to the petitioner.

From this decree the claimant appealed to the Circuit Court, where the decree of the District Court was reversed, and a decree entered adjudging that the claimant was first entitled to be paid. (Fols. 104, 105.) From this decree the petitioner has appealed to this Court.

POINTS.

FIRST.

The mortgage to the appellant is void as against the respondent, because the filing thereof was not renewed in accordance with the statute.

4 R. S., (Edm.'s Ed.) 435, §§ 1 and 2.
Ely vs. Carnley, 19 N. Y., 496.

Section one of the statute cited, provides that "every mort-"gage or conveyance intended to operate as a mortgage of "goods and chattels, hereafter made, which shall not be accom-"panied by an immediate delivery and be followed by an "actual and continued change of possession of the things "mortgaged, shall be *absolutely void* as against the creditors "of the mortgagor and as against *subsequent purchasers and* "*mortgagees in good faith,* unless the mortgage, or a true "copy thereof shall be filed as directed in the succeeding "section of this act."

Section two specifies the manner of filing, as follows: "The instruments mentioned in the preceding section shall "be filed in the several towns and cities of this State, where "the mortgagor therein, if a resident of this State, shall "reside at the time of the execution thereof; and if not a "resident, then in the city or town where the property so "mortgaged shall be at the time of the execution of such "instrument. In the city of New York, such instrument "shall be filed in the office of the Register of said city. In "the several cities of this State, other than the city of New "York, and in the several towns in this State in which a "County Clerk's office is kept, in such office; and in each of "the other towns in this State, in the office of the Town "Clerk thereof."

Section three declares that "every mortgage filed in pursuance of this act, shall *cease to be valid* as against the "creditors of the person making the same, *or against subse*"*quent purchasers or mortgagees in good faith* after the "expiration of one year from the filing thereof, unless within "thirty days next preceding the termination of the said term "of one year, a true copy of such mortgage, together with a "statement exhibiting the interest of the mortgagee in the "property thereby claimed by him, shall be again filed in "the office of the Clerk or Register aforesaid of the *town or* "*city where the mortgagor shall then reside.*"

(*a.*) The necessity for a renewal of the filing was not obviated by the fact that the mortgage had become absolute.

Ely vs. Carnley, 19 N. Y., (5 Smith,) 496.

SECOND.

The respondent is a "mortgagee in good faith," within the meaning of that term as used in the section last cited. He would not have been so if he had received actual notice of the existence of the mortgage to White's Bank of Buffalo (Gregory *vs.* Thomas, 20 Wend., 17.) Nor would he have been so had he not parted with value upon the strength of the mortgage executed to him. And here is one of the questions contested in this case.

THIRD.

Although the mortgage to the respondent was given to secure a precedent debt, he parted with value on the strength of such mortgage, and is therefore "a mortgagee in good faith," within the meaning of the statute.

(*a.*) He parted with value by agreeing in consideration of the execution of the mortgage to extend the time for the payment of the debt (which was then due) to November 1st, 1866.

Pratt vs. Coman, 37 N. Y., 440.
Burns vs. Rowland, 40 Barb., 369.
Traders' Bank of Rochester vs. Bradner, 43 Barb., 379.

These cases, although arising out of the transfers of negotiable paper, involve precisely the same question as that involved in the case at bar, and are therefore in point.

The head note in the case of Pratt *vs.* Coman, *supra*, is not full. By a perusal of the opinion of Judge Mason, (concurred in by a unanimous Court,) it will be seen that the "relinquishment of the right to enforce payment presently," of the precedent debt, was a parting with value.

(*b.*) The question as to what is such a "parting with value" as to constitute one a purchaser or incumbrancer in good faith, so as to protect him against a prior conveyance, lien or equity, has arisen many times in the Courts of New York, sometimes under the Chattel Mortgage Act, as in the cases of Van Heusen *vs.* Radcliff, 17 N. Y., 580; Thompson *vs.* Van Vechten, 27 N. Y., 581, and Woodburn *vs.* Chamberlin, 17 Barb., 446. Sometimes under the act for recording conveyances of real estate, by which conveyances not recorded were declared void as against any subsequent purchaser "in good faith and for a valuable consideration." (1 R. S., Edm. Ed., 707, m. p.

756;) as in the cases of Dickerson *vs.* Tillinghast, 4 Paige, 215; Westervelt *vs.* Huff, 2 Sand. Ch., 98; Stuart *vs.* Kissam, 2 Barb., 509; Jessup *vs.* Hulse, 29 Barb., 539; Wood *vs.* Robinson, 22 N. Y., 564. And sometimes under the statute protecting *bona fide* purchasers of chattels from the lien of an execution not actually levied but in the sheriff's hands, (2 R. S. 379, m. p. 366,) as in the cases of Slade *vs.* Van Vechten, 11 Paige, 20; Birdseye *vs.* Ray, 4 Hill, 158; 5 Denio, 619, and Warner *vs.* Paine, 3 Barb. Ch., 630.

The principle which determined those cases is cited by J. Denio. (Van Heusen *vs.* Radcliff, 17 N. Y., 583,) from Dickerson *vs.* Tillinghast, *supra*, as follows: "If one take the title to real estate in payment or as security for a previous debt, *without giving up any security or divesting himself of any right, or placing himself in a worse situation than he would have been in*, if he had received notice of a prior equitable title or lien previous to his purchase, a Court of equity will not permit him to retain the title which he had thus obtained to the injury of one having a prior equity." He is not a purchaser in good faith, *i. e.* a purchaser without notice and for a valuable consideration.

No case can be found in which it has been held that an extension of time for payment, was not a parting with value.

(*c.*) The respondent not only parted with value on the strength of his mortgage in that he extended the time for payment of his debt, but because at the time such extension was made the debt was good and collectable, and during the period of such extension, and before the respondent received notice of either of the prior mortgages, the mortgagor Zahn, became insolvent and the respondent's debt wholly uncollectable, unless out of the moneys in litigation herein. (Fols. 61 to 67, 71½, 76¾, 80½, 81.)

(*d.*) It is unimportant *when* the party receiving a conveyance or incumbrance, parts with value, whether at the time he receives his conveyance or incumbrance, or afterwards, provided it be before he has any notice of the previous title or incumbrance.

Warner *vs.* Winslow, 1 Sand. Ch., 430.

(*e.*) It is well settled that if a party on receiving a conveyance delivers up a valuable security on the strength of it, this is such a parting with value as will make him a *bona fide* purchaser.

Padgett *vs.* Lawrence, 10 Paige, 170, and cases cited, *supra.*

(*f.*) By the extension of the time of payment, and the consequent loss of the power to collect out of Zahn's other property by legal process, the respondent has as much parted with value as though he had released a mortgage on other property.

FOURTH.

The fact that Zahn had notice of the mortgage to the appellant, at the time he purchased from Hoyt, does not affect the respondent, although he claims by virtue of a mortgage from Zahn. The statute protects all "subsequent purchasers and mortgagees in good faith," and not simply all purchasers and mortgagees from the mortgagor.

Fox *vs.* Burns, 12 Barb., 677.
Dillingham *vs.* Bolt, 37 N. Y., 198.

FIFTH.

It was not necessary, as against the holders of either the mortgage to White's Bank of Buffalo or that to the Messrs. Grant, to file the respondent's mortgage under the statute of Ohio.

That statute is substantially like the chattel mortgage statute of New York, and declares that the failure to file a chattel mortgage, as provided by the act, shall render the mortgage void only as against "the creditors of the mortgagor and *subsequent* purchasers and mortgagees in good faith."

The mortgages to White's Bank of Buffalo and the Messrs. Grant, and the debts secured thereby, antedated the respondent's mortgage instead of being subsequent thereto.

SIXTH.

The evidence shows, beyond question, that the mortgage to the respondent was made in entire good faith.

It was claimed below that because of the fact that possession did not follow the respondent's mortgage, it was thereby rendered invalid, under § 5, Chap. 7, Title 2, Part 2d of the Revised Statutes, (2 R. S., 141, m. p. 136,) which provides that "every sale by a vendor of, &c., * * * and every assignment of goods and chattels by way of mortgage or security, * * * unless the same be followed by an actual and continued change of possession of the things sold, mortgaged, or assigned, shall be presumed to be fraudulent and void as against the creditors of the vendor, or the creditors of the person making such assignment, or *subsequent purchasers* in good faith, and shall be conclusive evidence of fraud, unless it shall be made to appear, on the part of the persons claiming under such sale or assignment, that the same was made in good faith and without any intent to defraud such creditors or purchasers."

It is sufficient to say, in reply to this: First, that the appellant is not a *subsequent purchaser*.

This statute applies to the appellant's mortgages, but not to that of the respondent.

Second. The respondent proved affirmatively that his mortgage was given in good faith, and thereby (if such presumption be applicable at all) disproved the statutory presumption of fraud. (See affidavits of Hard and Smith and deposition of Zahn, fols. 61–69.)

Thompson *vs.* Blanchard, 4 Coms., 303.

SEVENTH.

The Act of Congress of July 28, 1850, "providing for the recording of conveyances of vessels, and for other purposes," (9 Stat. at Large, 440,) does not supersede the necessity of filing mortgages on vessels, as required by the statute of the State of New York.

> By the first section of the act of Congress it is provided "that no bill of sale, mortgage, hypothecation, or conveyance of any vessel, or part of any vessel of the United States, shall be valid *against any person other than the grantor or mortgagor, his heirs and devisees, and persons having actual notice thereof*, unless such bill of sale, mortgage, hypothecation, or conveyance, be recorded in the office of the Collector of the Customs where such vessel is registered or enrolled. Provided that the lien by bottomry on any vessel, created during her voyage by a loan of money or materials, necessary to repair or enable such vessel to prosecute a voyage, shall not lose its priority or be in any way affected by the provisions of this act."
>
> Section two provides for the recording of such bill of sale, etc., and of certificates of discharge and cancellation.
>
> Section three provides for indexing such records by the collector, for public inspection thereof during office hours, and for the furnishing by the collector of certificates to any person desiring the same, setting forth the material facts of such bills of sale, mortgages, etc.
>
> Section four provides for the furnishing of certified copies of each bill of sale, etc., upon payment of a fee of fifty cents.
>
> Section five requires the owner or agent of the owner of any vessel applying for an enrollment or registry to set forth the part or proportion of such vessel belonging to each owner, and for the specification of such part in the registry or enrollment, and also in any bill of sale of the vessel.
>
> Section six is amendatory of the act of July 20th, 1840, as to the mode of entering complaints touching the unseaworthiness of vessels.
>
> Section seven denounces a penalty on criminal attempts to destroy any vessel belonging to a citizen of the United States.
>
> Section eight provides that the act shall take effect on the first of October, 1850.
>
> By the act "to regulate the fees of Custom House officers on the Northern, North-eastern and North-western Frontiers of the United States," passed March 3d, 1865, it

was provided that no bill of sale, mortgage, etc., of a vessel should be recorded unless the execution thereof had been duly acknowledged before some officer duly authorized to take acknowledgments of deeds.

The first inquiry under this point must be as to the nature of this act and the purpose for which it was passed. Is it an act having reference only to the relations between the government and the owners and incumbrancers of enrolled and licensed vessels, and intended for the purposes of revenue and the enforcement of the navigation laws only, to secure a complete registration of all instruments affecting the title of vessels? or,

Was it intended also as a declaration of what should be a legal bill of sale, mortgage or other conveyance of a vessel? or,

Is it simply a recording or registry act, having in view not only the interests of the United States in the enforcement of its revenue and navigation laws, but also the protection to a certain extent of bona fide purchasers and incumbrancers of interests in enrolled and licensed vessels of the United States?

(*a.*) In answer to this inquiry we must concede that there is difficulty in sustaining the theory first stated as to the character of this act, although it receives countenance from one of the opinions delivered in the Court of Appeals of the State of New York, in the case of the Ætna Insurance Company vs. Aldrich, 26 N. Y., 97, (Op. Wright, J.,) to which this Court is respectfully referred. The decision in that case is precisely in point.

(*b.*) The act is not one to provide what shall be a legal bill of sale, mortgage or other conveyance of an enrolled or licensed vessel.

As between the parties and their "heirs and devisees and persons having actual notice," that which was a valid bill of sale, mortgage or other conveyance before the act, remains so still.

Weston vs. Penniman, 1 Mason, 317.

Nor has the act, as between any parties whatever, any affirmative action or character. It is simply a negation, declaring that unless registry shall be made the conveyance shall be invalid as against certain parties, and neither expressly nor by implication declaring that if such registry shall be made the conveyance shall be deemed valid, *prima facie* or otherwise.

(*c.*) It is, however, in some sort, a recording or registry act, having in view, apparently, the protection of the interests of bona fide purchasers, as well as those of the United States in the enforcement of its revenue and navigation laws.

Having thus ascertained the character of the Act of Congress, it becomes necessary to determine,

First. Whether that act, so far as it assumes to regulate the transfer of the title of parties in such property is constitutional. There can be no doubt that for all purposes connected with the revenue or navigation laws, it was within the legitimate scope of the power of Congress to regulate commerce. Congress might properly refuse registration or enrollment to a vessel whose title had not been transferred in accordance with its regulations, but could it enter the domain of property and assume in all cases to regulate the transfers thereof? We respectfully submit that it could not.

(*a.*) This was evidently the opinion of the Congress which enacted the Registry Law of 1792, which was prepared by lawyers who would hardly have used the words "grantor, heirs and devisees," in the connection in which they are used in the act of 1850. Mr. Parsons says that our statutes of registry "were copied from the English Statute, substantially and almost literally, with one important exception." And that exception was in the omission of *a provision which made the transfer of a ship void, unless in writing and recorded.*

1 Parsons' Mar. Law, 50.

(*b.*) The power conferred upon Congress to regulate commerce, (giving to it the broadest scope ever claimed for it in this court,) is a power to regulate both traffic and intercourse between the States and with foreign nations—in other words, the power to *prescribe rules for the conduct of such traffic and intercourse.*

Commerce, traffic, intercourse, import action, *the use of property, and not abstract rights of property;* that which may be done by or upon vessels or other vehicles of commerce, and not the rights of property in such vehicles.

Certainly here is nothing in terms giving to Congress the power to enter the domain of private property, and to enact what shall be and what shall not be a valid transfer thereof.

It is, of course, only claimed that this power exists by implication as a necessary and proper means to the end in view, to wit: the regulation of commerce.

But does any such implication arise? Where else in any grant contained in the Constitution of the United States, is there to be found any power by which, even by implication, the General Government is authorized to say what shall be, and what shall not be a valid transfer of private property? Such a power, outside of this single grant, will be sought for in vain.

The rights of property, as well as of person, are carefully left to the several States, who, according to the theory of the framers of the constitution, were better fitted to regulate them properly, than any central government could possibly be.

The question therefore becomes most pertinent, whether there is any reason why Congress should have this power in order that it may properly regulate commerce among the States and with foreign nations.

(*c*.) There is no such reason.

A ship is undoubtedly the chief vehicle of foreign commerce, and one of the chief vehicles of commerce between the States, but so long as it is not engaged in commerce there can be no occasion for any legislation concerning it, beyond such precautionary measures as are necessary to prevent its engaging therein, without complying with the regulations of the revenue and navigation laws. It is so much wood, and iron, and hemp, the property of its owner, and its existence or the transfer of the ownership thereof, no more affects foreign or inter-state commerce than the existence or the sale of real estate of an equal value.

When, however, it is sought to use this wood, and iron, and hemp as a vehicle of traffic and intercourse with foreign nations, or other States, the manner of its use becomes of national importance, and the power of Congress lays hold upon it.

Congress may refuse to allow the vessel to leave the home port unless enrolled or licensed, and thus absolutely debar her from any connection with foreign or inter-state commerce; it may provide for the security of her cargo, passengers and crew; it may, in the fullest manner and with the most minute particularity, provide for the actual conduct of the business in which she is engaged; it may, doubtless, *for all purposes connected with such business, and the responsibilities arising out of it*, refuse to recognize any person as owner, unless his conveyance shall have been recorded.

What more could be desired "to regulate commerce," so far as any vessel connected therewith is concerned?

Why enter the domain of property, and assume, for the protection of parties *in no way connected with the business in which the vessel is engaged*, to regulate the transmission of the title to this property?

And this is precisely what the effect of the act must be if held applicable to the case at bar. For it will be observed that neither of the mortgages were executed in the course of the business in which the Emmett was engaged, nor did they have any connection therewith.

Deed void for want of stamp? Has Congress power to do it?

(*d.*) The fact that the vessel is enrolled or licensed gives Congress no greater power over her title, so far as this question of property is concerned, than it would otherwise possess.

Consent confers no jurisdiction of a subject matter where such jurisdiction would be otherwise wanting.

Besides, an owner who obtains the enrollment of his vessel because he cannot otherwise engage her in commerce, cannot be deemed thereby to resign his right to sell or dispose of her, by the observance of such formalities as the laws of his State alone prescribe.

(*e.*) If Congress have power to enact this registry law for the protection of creditors, purchasers, &c., simply because a ship is a vehicle of commerce, they have also the power to enact a similar law in relation to all locomotives, cars, wagons, sleighs and other vehicles used in the carrying on of commerce between the States or with foreign nations.

It is not apparent why they may not also (for an analagous reason) regulate the transfer of title to all property which is the subject of commerce.

It may also withdraw the transfer of the title of vessels, whether by act of parties or by operation of law, from the control of the several States, so that the same shall not be the subject of testamentary disposition or of distribution as part of the assets of an intestate.

EIGHTH.

The act of Congress does not supersede the necessity of filing under the State law, because it is not repugnant to, and does not in any manner conflict with, that law.

(*a.*) Without entering upon a discussion, which would at this day be at once useless and presumptuous, of the vexed question as to the nature of the power to regulate commerce, which by the Constitution is conferred upon Congress, we shall assume:

First. That before the passage of the act of Congress of July 29, 1850, the several States had the power to enact laws of the character of the chattel mortgage law of New York, which should apply to enrolled and licensed vessels as well as other chattels, by virtue either of a power to regulate commerce which was concurrent with the power of Congress, or by virtue of an independent and reserved power to regulate their own internal affairs, to protect persons trading in chattels from secret liens or titles, to enforce the collection of debts, and to prevent fraudulent transfers of property—a power repeatedly recognized by this court as residing in the States; sometimes spoken of (as by Judge Marshall in Gibbons *vs.* Ogden, 9 Wheat., 209,) as "a power to regulate their own purely internal affairs, whether of trading or police;" sometimes (as by Judge Taney in the License Cases, 5 How., 583) simply as the "police power" of the State.

Second. That no matter by virtue of what power such State laws may be enacted, if Congress, in the exercise of its power to regulate commerce, has enacted any statute which is plainly repugnant to, and inconsistent with, the State laws, the law passed by Congress is supreme and must prevail.

Third. That it is no objection whatever to distinct substantive powers, that they may be exercised upon the same subject, and that the sole question as to the validity of laws passed under these separate powers, one by Congress, the other by the Legislature of the State, is whether those laws are repugnant to or inconsistent with each other.

Fourth. That in the application of the principle of the supremacy of the laws of Congress in a case where the State law is but the exercise of a *reserved* power, the repugnance or conflict *should be direct and positive*, so that the two acts cannot be reconciled or consistently stand together.

Sinnott *vs.* Davenport, 22 How., 227, 243.
Gilman *vs.* Philadelphia, 3 Wall., 730.
Steamship Co. *vs.* Portwardens, 6 Wall., 31.
Gibbons *vs.* Ogden, 9 Wheat., 204, 208, 209, 210.
Wilson *vs.* Blackbird Creek Marsh Co., 2 Peters, 245.

(*b.*) The Chattel Mortgage Law of the State of New York, is not a commercial regulation. Its enforcement may affect commerce to some extent by acting upon one of the instruments of commerce, but the same is true of it because it may operate upon the subjects of commerce.

To affect commerce, however, was not its purpose.

It is general in its character, and has no special reference to property designed for use as vehicles or instruments of commerce.

Nor does it apply to any property, the possession of which follows the transfer of the title or the creation of the incumbrance. It is a general regulation for the protection of persons buying or taking securities on chattels of any kind against secret liens or titles. It is, in behalf of the creditors of the mortgagor, a part of the scheme provided by the State for the collection of debts, and for the prevention of frauds.

Some such statute is to be found, probably, in every State of the Union, and the reasons for its passage would have existed had the State of New York been so isolated from the rest of the world, as to have precluded the possibility of commerce, or other communication therewith. In short, the power which has been exercised by the State of New York in the passage of this law, was its power "to regulate its own internal affairs of trading and police."

(*c.*) That there is no conflict between the act of Congress and the State law under consideration, is plain. There is no difficulty in complying with both. This, therefore, brings the case clearly within the doctrine laid down by this Court in Sinnott *vs.* Davenport, 22 How., 243, where the Court say: "We agree that in the application of this principle of supremacy of an act of Congress, in a case where the State law is but the exercise of *a reserved power*, the repugnance or conflict should be direct and positive, "*so that the two acts could not be reconciled or consistently stand together*." And nothing can be more plain than that the proposition so enounced, must be correct.

(*d.*) Even were we compelled, in order to uphold the statute of New York, to concede that it is a commercial regulation, enacted by virtue of a power, concurrent with that of Congress, to regulate commerce, we submit that it could not be held to have been superseded by the Act of Congress.

There is nothing in that act to indicate that it was intended to exclude the operation of the State laws, and the silence of the statute in that behalf is almost as significant as would have been an express declaration that it was not so intended.

Whether there was such concurrent power in the States, we do not propose to discuss.

But if (as we shall assume,) such concurrent power did exist, we submit that the utmost that can be claimed for the Act of Congress, is, that it is an expression of the legislative will that registry shall be made in accordance with its terms, and that by no just construction can it be held to have been intended for the benefit of bona fide purchasers to provide the only system of registry or record of such conveyances.

NINTH.

Grant's mortgage was inferior as a lien, to the mortgage to the appellant, although the appellant's mortgage was not refiled. Because, First. Grant's mortgage was to secure a precedent debt, for the payment of which no additional time was given, and which is not shown to have been prejudiced by delay to collect.

Second. Because Grant had actual notice of the existence of the mortgage to White's Bank. (See testimony of Hoyt, Fol. 97½.) This put him on inquiry, and was equivalent to the constructive notice which a proper refiling of the petitioner's mortgage would have given him.

Gregory *vs.* Thomas, 20 Wend., 17.

TENTH.

The interest of the Messrs. Grant in the vessel, was cut off by the foreclosure of the mortgage to the appellant. It was claimed by the appellant, in his petition to the District Court, that the foreclosure was regular. This fact is admitted by the respondent in his answer, and the fact is also stipulated by both parties. (Fol. 33½.)

This foreclosure and sale being then pursuant to a power contained in the mortgage, was as effective as a foreclosure and sale in court would have been, so far as parties, whose liens were inferior to the appellant's mortgage, were concerned.

The assignment of Grant's mortgage to the appellant, in October, after the sale, was therefore the transfer of an extinct security.

ELEVENTH.

The agreement testified to by Haddock, does not avail to preserve the lien of the Grant mortgage as against the respondent.

Upon nothing can it be now deemed in life; certainly not, unless equity requires it.

If there be any such equity it is either in the petitioner or in the Messrs. Grant. That there is none in the bank is apparent; nor does any reside in the Messrs. Grant which can be enforced.

The most that can be said by them is, that if the arrangement with Haddock had not been made they would have bought at the foreclosure, and then, after the vessel had been libelled in the admiralty and sold, they could have stood on their own mortgage, as well as the title derived under the sale on the appellant's mortgage. But whether this be so or not, the obvious reply to them is, "you would, (had you bought at the foreclosure sale,) have been compelled to pay the amount due on the mortgage to the bank. If these moneys are now given to Smith, you will be no worse off. You have agreed that the appellant's debt shall be first paid out of the proceeds of the vessel. *Now those proceeds are not sufficient to pay the amount of the debt to White's Bank, and there is no chance for you to get a farthing.* Therefore your equities may be laid out of the question, and the title to these moneys contested by the appellant, standing on the sale under its mortgage and the respondent standing on his mortgage. You have no practical interest in the matter, and equity is not called upon to revive your extinct security."

Observe with reference to this question, that the debt to the appellant stands at its full face, $4,000 and interest, for the $1,500 nominally bid at the foreclosure, would not as between Grant and the bank be deemed a payment on the bank's debt.

TWELVE.

But the mortgage to Grant & Son was also void as against the appellant.

First. As to Hoyt's half of the vessel, because not filed in Brooklyn, where, within the meaning of the chattel mortgage act he resided.

(See Hoyt's testimony on this subject, folio 36 to 43.)

(*a.*) It appears that Hoyt abandoned Buffalo as his residence about the sixth of February, 1865, and went East with his family to reside. His wife's father lived in Brooklyn, and his own father in New York. He sent the most of his baggage to his wife's father's, but took one trunk with him to his own father's, where he and his family made a visit of two or three days. (Fol. 40½.) They then went to Mrs. Hoyt's father's in Brooklyn, with the intention of "remaining there temporarily until he could find a residence in New York," (fol. 42½,) and expecting to pay board to his father-in-law so long as he should remain with him. (Fol. 42.) There, at the house of his wife's father, he made his "family headquarters" till about the first of June, and then having failed to find a house in New York, went to housekeeping in Brooklyn. (Fol. 37.) In the mean time, and till about May 1st, he tried to find a house in New York.

(*b.*) It appears, therefore, that Hoyt had lost his residence in Buffalo, and if he did not reside in Brooklyn, he resided in no particular city or town.

It is true that Brooklyn was not his permanent residence, but it was the only residence he had; it was his "settled abode for a time," (Webster's Dic.: reside, residing, &c.,) the place where he intended to stay, as he himself says, until he could find a residence to suit him in New York.

(*c.*) If, however, he had lost his residence in Buffalo, and acquired none in Brooklyn, it was then impossible to file the mortgage at his place of residence, *and the mortgagee could only protect himself by taking possession of the property.* This he did not do, and as to Hoyt's half, therefore, the mortgage was invalid.

Dillingham *vs.* Bolt, 37 N. Y., 198.

In the case cited the mortgagor had ceased to reside within the State before the last thirty days of the year in which the mortgagee was required to refile his mortgage. The Court said, (p. 201,) "Although, at first view, it would seem that the requirement of the statute making a refiling necessary within thirty days before the expiration of the year, cannot apply to cases where the mortgagee is not, during the thirty days, a resident of the State, because the refiling is specifically required to be in the office of the Clerk of the town where the mortgagor shall *then* reside, *which requirement is nugatory if the mortgagor does not then reside in the State*, still, in view of the specific provision of the same section, that every mortgage, filed in pursuance of this act, *shall cease to be valid*, as against subsequent purchasers in good faith, after the expiration of a year from the filing thereof, unless within thirty days next preceding the expiration of said term of a year from the filing thereof, a true copy of such mortgage, together with a statement," &c., "shall be again filed in the office of the Clerk of the town where the mortgagor shall then reside, we think it must be held that when the contingency occurs, which has happened in this case, the mortgagee must, as against the creditors and purchasers mentioned in the section, take advantage of his mortgage within the year, *or lose the benefit of it as against them.*" * * * "The refiling, made in the town where the mortgagor had formerly resided, was of no avail."

This construction of the statute is by the court of last resort on this subject, and renders every chattel mortgage "absolutely void as against the creditors," &c., as declared in the first section of the act, unless the mortgage or a copy shall be filed as provided by the second section.

unless followed by possession

If such filing be impossible because the mortgagor, being a resident of the State, but not of any particular city or town therein, has no residence where filing may be made, then the mortgage is void, unless followed by possession in the mortgagee. And if, when at the time of the execution of the mortgage, the mortgagor is a non-resident of the State, and the mortgaged property is not then within the State, and filing, according to the requirements of section two is therefore impossible, the mortgage is also void as against creditors, &c., unless followed by possession.

Second. The mortgage is void as to Zahn's half of the vessel, for the reason stated in the last paragraph. He was not a resident of the State of New York, and the vessel, at the time of the execution of the mortgage, lay at Sandusky, Ohio. (Fol. 28½.)

THIRTEENTH.

The decree of the Circuit Court should be affirmed, and the moneys paid to the respondent.

SHERMAN S. ROGERS,
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